Supreme Court, U. S.
FILED
NOV 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-612

ANTHONY SOLDANO,

Petitioner,

-v.-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
Attorney for Petitioner
11 Park Place
New York, N.Y. 10007
(212) 227-0959

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Opinion of the Court Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 12

POINT I—The Court Below Should Have Granted The Petitioner A Pre-Trial Evidentiary Hearing To Test And Determine The Validity Of The Identification Of The Petitioner From The Photographic Display. 12

POINT II—The Court's Charge As To The Jury's Appraisal Of The Identification Evidence Was Inadequate And The Requested Instruction Should Have Been Granted. 16

POINT III—The Evidence Was Insufficient To Serve As The Basis Of The Verdict That Petitioner Was Guilty Of A Conspiracy Because At Most The Government Established A Single Transaction ... 17

POINT IV—The Petitioner Was Not Tried For The Overall Conspiracy Alleged In The Indictment Since The Proof Showed Multiple Conspiracies. .. 18

Conclusion 22

Appendix (Opinion and Judgment of the Court of Appeals) 1a

CASES CITED

Brathwaite v. Manson, 527 F 2d 366 (Cir. 2d, 1975) ... 14

Brown v. Illinois, 422 U.S. 590 (1975) 15

Bruton v. U.S., 391 U.S. 123 (1968) 19

Chapman v. State of California, 386 U.S. 18 (1967) ... 20

Davis v. Mississippi, 394 U.S. 721, (1969) 15

Direct Sales v. U.S., 319 U.S. 703, 712 footnote 8 17

Gerstein v. Pugh, 420 U.S. 103 (1975) 15

Gilbert v. California, 388 U.S. 263 4

Neil v. Biggers, 409 U.S. 188 14

People v. Ballott, 20 N.Y. 2d 600, 31 5

Pinkerton v. U.S., 328 U.S. 640 (1945) 20

Schneckloth v. Bustamonte, 412 U.S. 218 12

Simmons v. U.S., 390 U.S. 377 4

Stone v. Powell, 49 L. Ed. 2d 1067 (1976) 12

Stovall v. Denno, 388 U.S. 293 4

U.S. Ex Rel. Rivera v. McKendrick, 488 F. 2d 30 4-5

U.S. v. Famulari, 447 F. 2d 1377 5

U.S. v. Holley, 502 F. 2d 273 (Cir. 4th, 1974) 17

U.S. v. Johnson, 461 F. 2d 1165 (Cir. 5th, 1972) 12

U.S. v. Katz, 271 U.S. 354 (1926) 17

U.S. v. Mauro, 507 F. 2d 802 (Cir. 2d, 1974), cert. den. 95 S. Ct. 426 13

U.S. v. Wade, 388 U.S. 218 4

STATUTES CITED

18 U.S.C. 2 3

18 U.S.C. 3502 4

21 U.S.C. 841 (a)(1) 3

21 U.S.C. 846 3

28 U.S.C. 1254(1) 2

OTHER AUTHORITIES

Federal Rules of Criminal Procedure 41(f) 12

Moore's Federal Practice 14

U.S. Constitution, Amendment V 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1976 TERM

NO.

ANTHONY SOLDANO,

Petitioner,

-v.-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petitioner, Anthony Soldano, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 7, 1976, affirming the judgment of the United States District Court, in the Southern District of New York, convicting the petitioner after trial (Irving Ben Cooper, U.S. District Judge) and a jury of the crimes of conspiracy and distributing and possessing with an intent to distribute a narcotic drug, in violation of Title 21 U.S.C. On December 5, 1975 the petitioner Anthony Soldano was sentenced to concurrent jail terms of 15 years each, to be followed by a special parole term of 3 years.

OPINION OF THE COURT BELOW:

The opinion (as well as the decision) of the United States Court of Appeals for the Second Circuit, is reproduced in Appendix A below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED:

1. Was the trial court correct in summarily denying a pre-trial application by petitioner to suppress a pre-trial identification of the petitioner by the government's sole witness, one Verzino, who identified petitioner at trial, said witness having been shown a series of photographs among which was a photograph of the petitioner, such display having been presented within six (6) months of trial; and, was the trial court correct in summarily denying the motion by doing so without prejudice to the petitioner renewing the same at trial and at the trial ruling that the petitioner should test the pre-trial identification in the presence of the jury?

2. Was the trial court correct in refusing to charge the jury as to the identification of petitioner, and in what manner the jury should appraise the evidence of such identification or alternatively was the trial court correct in refusing to charge according to a "model charge" as to identification?

3. Since at most the government sought to prove the petitioner engaged in but one solitary transaction, was the petitioner shown to have been a member in the conspiracy as charged in count 1 of the indictment?

4. Where the indictment charged but one overall conspiracy and the government's proof disclosed multiple and disparate conspiracies, was there a fatal variance between the indictment and the proof, a misjoinder of parties, or a violation of the petitioner's right to be tried on what the grand jury indicted him for?

CONSTITUTIONAL PROVISIONS INVOLVED:

Amendment V:

"No person shall be held to answer for a Capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person . . . , nor be deprived of life, liberty, or property, without due process of law; . . ."

STATUTORY PROVISIONS INVOLVED:

21 U.S.C. 841(a)(1):

"(a) Except as authorized by this Title, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance; or

. . .

(2) ***"

21 U.S.C. 846:

"Attempt and conspiracy. Any person who attempts or conspires to commit any offense defined in this Title is punishable by imprisonment or fine or both which may not exceed the maximum punishment provided for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. 2:

"Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands,

induces or procures its commission, is punishable as a principal.

(b) ***."

18 U.S.C. 3502

"Admissibility in evidence of eyewitness testimony—The testimony of a witness that he saw the accused commit or participate in the commission of a crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States . . ."

STATEMENT OF THE CASE

THE PRE-TRIAL MOTION FOR A HEARING TO DETERMINE THE PRE-TRIAL IDENTIFICATION OF THE PETITIONER ANTHONY SOLDANO:

Prior to trial the petitioner through counsel moved by a written application for a hearing to determine the in-court identification of the petitioner, and the sources of such in-court identification (1-5)*. It was argued that counsel sought an order directing disclosure of whether the petitioner was placed in a line-up, show-up or identified by display of photographs to a witness, counsel citing *U.S. v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; *Stovall v. Denno*, 388 U.S. 293. Counsel further reasoned that there should be further disclosure as to identification in regard to the use of "mug shots" or photographs as part of a pre-trial identification procedure, counsel citing *Simmons v. U.S.*, 390 U.S. 377; *U.S. Ex Rel. Rivera v.*

---

*( ) This refers to the pagination of the appendix furnished by the appellant to the United States Court of Appeals for the Second Circuit.

McKendrick, 488 F. 2d 30 . . . ; *U.S. v. Famulari*, 447 F. 2d 1377 and *People v. Ballott*, 20 N.Y. 2d 600, 31.

At the arraignment petitioner was asked to plead to the indictment which charged one Anthony Visconti, with the offenses. Tne petitioner argued that he was never known by that name. The United States Attorney opposed the application arguing that the grand jury committed an error but intended to indict the petitioner (36). In answering the petitioner's motion for a pre-trial hearing, the government merely alleged that:

> "Defendant Soldano's identity was established by means of photographic identification." (39)

The motion seeking relief as to the identification issue was denied. In regard to request number 2 of petitioner's application, petitioner asked in advance of trial for an evidentiary hearing to determine the identification issue.

On the eve of trial, counsel again asked for a hearing as to the identification issue, the government responded by stating that there was no suggestive photographs shown to any witness in the case and that would be established when the witness testified about his relationship with the petitioner (44).

The Court then told counsel that it was desirable that the trial proceed, and counsel should bring up the issue when the jury would not be inconvenienced (44, 45).

Shortly after one Perna, a government witness, commenced testifying and counsel again raised the matter as to the identification of the petitioner. The Court told the petitioner to wait until further proceedings were had (46, 47).

Mario Perna, testified he was working with one Anthony Verzino, in the trafficking of narcotics (48, 49). In January 1974 Verzino told Perna that he made a "new connection" for procuring narcotics and "Tony" was said to be the

source. According to Perna, Verzino told him that if two kilos were paid for, a third would be transferred on consignment (49, 50). Verzino further explained that he spoke to "Ernie" (defendant Ernest Malizia) brother of one "Pontiac" and that he, Verzino and one Frank Caravalla, were introduced to "Tony" in Long Island by "Pontiac" (50). Verzino also told Perna that "Tony" didn't want to meet anyone else irrespective of that persons relationship and that "Tony" only wanted to talk to Verzino. Verzino added that he had an appointment with Tony on the following day (50).

According to Perna, Verzino stated he was desirious of dealing with "Tony" from Long Island because Verzino would then be "closer to the original source . . . " (51). Perna had met "Patty Pontiac" previously with his brother Ernie Malizia, Verzino and Frank Caravalla, also known as "Skinny Frankie" (52, 53).

The following day Verzino having procured some money, arranged with Perna and Caravalla to go to Long Island in two cars (54, 55). On the way there, they joined at a motel to count the money so they could be ready for "Tony" (55). While at the motel Perna told Verzino to continue, alone as "Tony" didn't want to meet anybody. Verzino told Perna he would meet Perna later that day at the Astor Bar in the Bronx (55). Perna then returned to the Bronx but met nobody that day (56). However at 9:30 P.M. Verzino and Caravalla met him at the Astor Bar (56).

Verzino told Perna that he had a problem in that after meeting "Tony", "Tony" was to deliver the goods in lower Manhattan but did not appear (56). That "Tony" instead called Verzino to meet him in Queens, which was the place for the delivery (57). According to Perna, Verzino told him that "Tony" phoned him telling him that they had to meet in Queens and according to Verzino they ultimately did. At Queens at a Restaurant they picked up the narcotics.

Verzino then returned to lower Manhattan to meet "Skinny Frankie" and they all proceeded to the Astor Bar in the Bronx (57).

Having the narcotics, Perna and Verzino then tested three kilos (58, 59).

The next witness was Verzino (61). On direct examination he described his past dealings in narcotics, and he related how he met Ernie Malizia and Perna after he was released from Atlanta Penitentiary. At this meeting Perna asked him whether he entertained any animosity towards him and Verzino replied that he was as yet undecided (67). Malizia offered him $3,000 and asked him whether he was interested in joining him in a narcotics enterprise (67). At these negotiations, Verzino asked Malizia about the persons they dealt with telling him he was as yet undecided, but ultimately joining Malizia (68, 70).

At this phase of the case Soldano's counsel again renewed his application relating to the pre-trial identification and the ultimate suppression of a court room identification. The prosecutor replied that there was no impermissible photographs shown of the petitioner to this witness (72, 73). The prosecutor replied that counsel could cross examine Verzino; the Court ruled that the petitioner was not entitled to a hearing but if there was something advanced that would cause the Court to change its ruling, the Court would change it. Then the Court stated that counsel would be given an "opportunity" and that " . . . you will not go into his client's testimony until we have a chance to pick up this point that he has raised." (73).

Perna's direct examination was then continued. At this phase of the case he related that late in January 1974 Caravallo told him that they had to go to Long Island to see "Pontiac" at a bar in Port Washington called Jimmy's

Backyard (82, 83). The next day Caravallo and Verzino met "Patsy Malizia" at the bar (84). Malizia told Caravallo to leave and Caravallo complied. Later "Tony" appeared and was introduced to Verzino by Patsy Malizia (84). Verzino described "Tony" as being of medium height, stocky, a medium stocky built, large head, well dressed, solid walk, fair complexion, dark hair of what the witness ". . . could see of his hair. At the time he had a hat on, and well kept hands." (84)

"Tony" told Patsy that the price would be $50,000 and Verzino replied that he didn't know how much money he had (85, 86). Credit was discussed but Verzino was told that he would have to pay $75,000 and an appointment was made for the next day (86, 87). The witness then made an in-court identification of the petitioner (88). After the conversation "Tony" left. That evening Verzino met Perna and others at a restaurant in the Bronx (88). They discussed raising money that night and Verzino suggested making the purchase (90, 91). The next day Verzino managed to get $25,000 from a Mr. Robin, and met Perna and Caravalla (91). They then proceeded to Port Washington in two cars (92).

As Perna testified, so did Verzino to the effect that they rented a motel room and counted the money there (Government's Exhibit 84, 93, 94). They all then proceeded to Port Washington and met at the bar called Jimmy's Backyard (95).**

Arriving at their destination, "Pontiac" met them and "Tony" drove up in a Buick. The witness said that he had $75,000 and "Tony" asked whether that was "all" (96).

The witness then identified the petitioner as being "Tony" (96, 97).

**This contrasted with Perna's testimony that he left the motel and returned to the Bronx (55, 56).

Continuing his testimony, Verzino described the arrangements for the sale of the narcotics (97). The narcotics were to be transferred to the witness' car and the witness was to meet "Tony" at Mulberry Street, New York City (98). "Tony" also was said to have asked whether Caravalla was "Teresa's" brother (99, 100). It so happened that on returning to New York with Caravalla, Verzino mentioned this incident to him and Caravalla stated that he recognized "Tony" who used to go to a "game" (100).

Verzino related that he never met "Tony" before the one instance described (100). Arriving in lower Manhattan, he met "Tony" (101). "Tony" told him he would drive Verzino's car and they agreed to meet later (101, 102). He later met "Tony" for a second time at the same locale and "Tony" told him that he would have to meet him in Long Island (103). Ultimately the witness and the person he said was the petitioner met in Queens (104, 105). The witness' car was returned to him and in the trunk was a box (106). Verzino then ultimately met Perna and they tested the contents of the box that was left in Verzino's car. It contained three (3) kilos of narcotics (107, 108). Verzino would have $75,000 paid to the person he said was the petitioner, the payments being made through Caravalla and Malizia.

Before cross examination, counsel for the petitioner made an application (113). That application recited that the petitioner was originally indicted as Anthony Visconti and that the petitioner requested exculpatory material from the government as to all reports and identifications leading up to the misidentification as well as the grand jury testimony identifying Visconti and the petitioner and indictments number 75 CR 24 and 75 CR 687 (115). The request by counsel was for the material prior to cross examination so that counsel would not have to cross examine blindly (115).

The government opposed the application stating it didn't consider the request to come under its obligation to supply

exculpatory material adding that if the Court wanted an additional response the government would give it (114). The Court denied the application (115).

Cross examination then began (115). Verzino stated that in discussing his involvement with a state prosecutor, he never mentioned the petitioner (123, 124). Petitioner's Exhibit A, a writing, disclosed that Verzino told a New York City police officer that he did not want to go at it "tough" with his old friends (123).

In regard to the identification of petitioner, Verzino stated that in August 1974 he gave a description of Soldano which ran as follows: medium height or a little better, stocky, large boned, well-kept hands, balding, well-dressed, between 45 and 55 years old (130, 131).

He readily admitted that he never described the person he said was the petitioner only calling him "Tony" (131). He saw the person he named as the petitioner in January 1974. Within six (6) months prior to trial he saw a large group of photographs and was asked to select anyone he knew (131, 132). From that series of photographs he selected a picture of the petitioner (132, 135). He gave no written material as to the pre-trial identification (134). In August 1974 he gave a description of the petitioner (137, 138). However in the fall of 1974 he was led to believe that the petitioner's last name was not "Soldano", the witness being told by an agent that it was Visconti (138, 139). He only related to the grand jury that the man he dealt with was "Tony" (139). When the witness met the petitioner in the street, petitioner was wearing a hat, and this was in the evening (141, 142). He could not recall how he described the petitioner (142). The only time the witness had an opportunity to meet "Tony" was either in the evening or inside a car or in daylight when "Tony" was wearing a hat (143). He couldn't recall how many other suspects he may have selected from the series of pictures shown to him (144,

145). Then he added it could have been 5 or 10 suspects (145).

Petitioner's Exhibit C consisted of the pictures (145, 146). But these pictures were taken March 14, 1975 and therefore the witness had no opportunity to identify the petitioner for a period of 14 to 15 months (147).

On re-direct examination Verzino testified that the agents asked the witness if "Tony" had a last name that was "Christopher" and the witness told him he didn't know (153). It now developed that "Christopher" was another informer (155).

On re-cross examination Verzino stated that "Christopher" suggested the name Visconti (158). He also admitted that the petitioner never held himself out by the name Visconti (159).

As part of the evidence in this case, there was a stipulation entered into between petitioner's counsel and the government and that stipulation is found on pages 162 and 163 of the appendix. That stipulation was to the effect that the appellant was present at 131 Mott Street on March 13, 1975. That federal and city authorities entered the premises on the belief that a dice game was in progress. That the petitioner with other persons was given a summons directing his appearance in the New York City Criminal Court for loitering for the purpose of gambling. The charge was dismissed. That the photographs comprising petitioner's Exhibit C included the petitioner's photograph taken at the time of the issuance of the summons and that Exhibit C was shown to Verzino after March 14, 1975. And furthermore, before July 10, 1975 the name Visconti appeared in the place of the name "Anthony Soldano" as alleged in the indictment (163).

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT BELOW SHOULD HAVE GRANTED THE PETITIONER A PRE-TRIAL EVIDENTIARY HEARING TO TEST AND DETERMINE THE VALIDITY OF THE IDENTIFICATION OF THE PETITIONER FROM THE PHOTOGRAPHIC DISPLAY

18 U.S.C. 3502 would seem to be relevant to the issue presented in this phase of the application.

Where there is a pre-trial identification of a suspect, and it is claimed that the same is highly suggestive so as to taint an in-court identification, 18 U.S.C. 3502 does not mandate or permit the in-court identification. See *U.S. v. Johnson*, 461 F. 2d 1165 (Cir. 5th, 1972).

A motion to suppress evidence because of a wrongful search and seizure (4th Amendment to the Federal Constitution) (Rule 41(f) Federal Rules of Criminal Procedure), seeks to insulate a case from evidence having probity. See *Schneckloth v. Bustamonte*, 412 U.S. 218, at pages 239-242, 243. More recently, this Court again considered the values underlying suppression of evidence in *Stone v. Powell*, 49 L. Ed. 2d 1067 (1976). There this Court held that the issues underlying the 4th Amendment would not be re-evaluated on the collateral application in a federal court to test the search and seizure claims made in a state court. This because of the probative value of evidence. See however, the concurring opinion of Chief Justice Burger.

As was stated in "Eye-Witness Identification", Judge Nathan R. Sobel, Clarke-Boardman Company, Ltd., New York, New York, 1972, at page 15 thereof:

> "Convinced of the dangers of eye-witness identification, the Supreme Court moved to establish constitutional and procedural safeguards and sanctions."

It would seem therefore that what the petitioner sought in this case ran to the probity of evidence, namely, the in-court identification. The Court below should have granted a pre-trial hearing under the then Rule 12 of the existing Rules of Federal Criminal Procedure. In subdivision (4) of that rule, it was provided that a motion before trial raising an issue or objections was to be determined before trial unless the Court ordered it deferred for the termination of trial of the general issue. It was further provided in the then existing Rule, that issues of facts could be tried before a jury if such was required under the Constitution or an Act. The Rule concluded by directing that all other issues of fact should be determined by the Court with or without a jury or in affidavits or in such manner as the Court may direct. It would seem therefore that the Court below gave no consideration to this Rule then in effect.

The trial court in stating to counsel that the application could be renewed at trial clearly violated a ruling of the Court of Appeals for the Second Circuit found in *U.S. v. Mauro*, 507 F. 2d 802 (Cir. 2d, 1974), cert. den. 95 S. Ct. 426. There a motion to suppress evidence under Rule 41 was initially brought during the trial and was denied. The basis for the denial was the delay in making the motion and so was the lack of merit to the motion. However the Court of Appeals for the Second Circuit in resolving the issue against the appellant in that case pointed out that the then existing Federal Rules of Criminal Procedure 41(f) relating to motions to suppress did not provide that such motion had to be made before trial. However, that Court also then cited Rule 12(b) of the Rules of Criminal Procedure which was held to govern. Three months after this trial ter-

minated, present Rule 12 of the Rules of Criminal Procedure took effect. It was provided in subdivision (3) of that Rule that motions to suppress evidence should be made before a trial. In subdivision (e) thereof, it was provided that a motion made before trial as required by that Rule should be determined before trial unless there was a good cause for deferring the ruling. The Rule then concludes by stating that where factual issues are involved in determining such a motion the Court should "state its essential findings on the record".

As stated in "Moore's Federal Practice" at pages 12-21:

> ". . . Dealing with motions to suppress, makes it clear that any objections in evidence predicated on the ground that it was illegally acquired must be made before trial. . . . The determination of a motion to suppress prior to trial . . . regardless of the basis of the claimed illegality . . . is a salutary procedure in that it tends to eliminate from the trial any disputes pertaining to police activity not immediately pertinent to the defendant's guilt."

The government's response to the petitioner's application was a general statement that there was no suggestive display of photographs (39, 72, 73). Furthermore the Court's ruling in denying the motion did not contain any findings. The Court merely made a bland denial of the motion.

In *Brathwaite v. Manson*, 527 F. 2d 366 (Cir. 2d, 1975) the Court below referring to the holding in this Court in *Neil v. Biggers*, 409 U.S. 188 held that the issue of the suggestiveness of a procedure is not a matter to be argued before a jury. In *Brathwaite v. Manson*, certiorari was granted by this Court in *Manson, etc. v. Brathwaite*, May 3, 1976, reported at 48 L. Ed 2d 202.

It is respectfully submitted that the issue of due process under the 5th Amendment to the Federal Constitution or

the lack thereof, in regard to the display to the government's witness before trial of photos, was an issue for the Court, prior to trial, to determine. By affording the petitioner a pre-trial hearing, counsel would have been free to examine all persons involved in the identification process. Due process was denied the petitioner by the procedure adopted by the trial court, because it put counsel to the dilemma of not examining Verzino as to a photographic confrontation or else "bolstering" Verzino's in-court identification by referring to the photographic identification had before trial. Furthermore, a pre-trial hearing would have involved the 4th Amendment issue because it could have been determined whether the validity of the New York arrest (probable cause) which was the basis of the taking of the photograph, was present. See *Brown v. Illinois*, 422 U.S. 590 (1975); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Davis v. Mississippi*, 394 U.S. 721, (1969).

There was nothing before the trial court by way of opposition to the petitioner's application. The petitioner was not present when the photographic display was made to Verzino; he knew nothing about it or the circumstances surrounding it. All petitioner knew was that it was made. The government's opposition to the motion contained a bland statement that the petitioner was identified by photographs and nothing more. How the Court could have determined the motion when the government showed nothing by way of the propriety of the display is puzzling. An evidentiary hearing could have developed whether Verzino failed to identify the petitioner at all; whether he was prompted; whether he was shown other photographs of the petitioner; what he may have been told before making the selection. The selection itself in the manner it was presented, may have been suggestive. Thus the petitioner's photograph may have been accented in such a way that the selection was made not because the petitioner was involved

in the transaction, but because the petitioner's photograph was placed or situated or displayed under such circumstances that the same was suggestive.

POINT II:

THE COURT'S CHARGE AS TO THE JURY'S APPRAISAL OF THE IDENTIFICATION EVIDENCE WAS INADEQUATE AND THE REQUESTED INSTRUCTION SHOULD HAVE BEEN GRANTED.

At the conclusion of the Court's charge, the petitioner duly excepted and asked that the "Model Instruction" be given (170, 40-42). Even the government apparently troubled because the Court's charge initially did not refer to the issue of identification, stated that "something should be said to the jury with respect to identification of Soldano" (172). The Court indicated that identification required no greater proof than other factual issues (172, 173, 174). However since the government apparently was troubled, the Court then asked the government what portion of the petitioner's submitted request the government required and the government selected an innocuous portion of the model charge.

The Court's charge to the jury in this respect was as follows:

> "Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the events and to make a reliable identification later." (174).

This of course was followed by the following statement by the Court:

> "Is that what the government consents to?" (175).

According to the trial court, the prosecutor was to be satisfied.

It is respectfully suggested that one of the most important features of the requested instruction was a direction that the government's burden "specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime of which he stands charged . . ." (See *U.S. v. Holley*, 502 F. 2d 273 (Cir. 4th, 1974).

POINT III:

THE EVIDENCE WAS INSUFFICIENT TO SERVE AS THE BASIS OF THE VERDICT THAT PETITIONER WAS GUILTY OF A CONSPIRACY BECAUSE AT MOST THE GOVERNMENT ESTABLISHED A SINGLE TRANSACTION.

The government's evidence as to the petitioner disclosed but one transaction with the petitioner. Whether a buyer or a seller of contraband can be parties to a conspiracy is questioned. In *U.S. v. Katz*, 271 U.S. 354 (1926) where the accused were convicted of a conspiracy for the illegal sale of whiskey it was held on page 355 that:

> ". . . The overt act charged in each indictment was the sale of whiskey by one defendant to the other. This is an offense . . . ; but as the defendants in each case were only one buyer and one seller and as the agreement of the parties was an essential element to the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity . . ."

In *Direct Sales v. U.S.*, 319 U.S. 703, 712, footnote 8, it was stated by this Court in part that:

> "This may be true for instance of a single or casual transaction not amounting to a course of business regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiesence in his desire to purchase for whatever end. A considerable degree of carelessness coupled with casual transactions . . . are outside the boundary of conspiracy . . ."

On page 713, this Court further held that participation in the conspiracy is shown when:

> ". . . When the evidence discloses such a system working in prolonged cooperation with the physician's unlawful purpose to supply him with the stock in trade for his illicit enterprise . . ."

The random transaction in this case, the casual transaction in this case, did not make, it is submitted, the petitioner a party to any conspiracy.

POINT IV:

THE PETITIONER WAS NOT TRIED FOR THE OVERALL CONSPIRACY ALLEGED IN THE INDICTMENT SINCE THE PROOF SHOWED MULTIPLE CONSPIRACIES.

As argued in Point III, there was a solitary transaction involving petitioner and this by the words of the two government witnesses, with sordid backgrounds. Yet Soldano was tried with seven (7) other defendants while the jury heard myriad and sordid transactions.

There was no connection between the petitioner and the government's witnesses who were heavily engaged in narcotic transactions claiming that other defendants were involved with them. The petitioner was indicted with 19 co-

defendants and with six additional named but unindicted co-conspirators. The indictment also charged 16 substantive counts, only one, the ninth, which charged the petitioner. The thousands of pages of testimony went into the activities of the government witnesses with defendants other than the petitioner.

The 5th Amendment to the Federal Constitution provides that a person to be tried for a felony has to be indicted by a grand jury. The grand jury in this case charged the petitioner and the other defendants with one overall conspiracy. The proof showed more than one conspiracy. While this may have been a variance between pleading and proof, it is respectfully suggested that this is not a legal nicety. Petitioner relies on what the 5th Amendment states; not on a trial that became unmanageable, thereby excusing the government because of a variance between pleading and proof.

Of course petitioner relies upon *Kotteakos v. U.S.*, 328 U.S. 750 (1945) and citing the symbolization found at page 755, petitioner urges that this was a "spoke" conspiracy.

It is unrealistic to state that a jury can comprehend a proper instruction to the effect that if there is more than one conspiracy the jury should acquit the defendants or the accused. In short, the jury under a situation such as this, is asked to acquit because the government did not fail to prove its case, but over-proved it. See *Bruton v. U.S.*, 391 U.S. 123 (1968).

Recognizing of course, that the "variance", alone will not be instrumental in earning the petitioner a reversal, petitioner is constrained to show that the error was not harmless. However, since it has been argued that the variance goes to trying the petitioner for something the grand jury did not indict him for, the variance may be unconstitutional. In such case, the government to show the error was harmless must establish that it was innocuous

beyond a reasonable doubt. See *Chapman v. State of California*, 386 U.S. 18 (1967).

The Court also charged the jury in regard to the substantive counts and that charge was to the effect that even if the particular accused did not perform the acts, if the acts were performed pursuant to the conspiracy and the accused is a member of the conspiracy he is bound by the other acts. Thus on page A248 of the Appendix, the following portion of the charge is set forth:

> "In other words, if you find a reasonable doubt that the persons identified as Skooch and Charlie were members of a conspiracy to distribute or sell heroin along with Mangano, Pallata and Bolella, you may find Mangano, Pallata and Bolella guilty of these three counts if you determine that Skooch, or Charlie physically distributed the heroin in furtherance of the conspiracy."
>
> "The same principle applies with respect to count 9. This count charges the defendants Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin."

In other words, the charge following the ruling of this Court in *Pinkerton v. U.S.*, 328 U.S. 640 (1945).

On the other hand, even if the harmless error standard enunciated in *Kotteakos v. U.S., supra*, 388 U.S. 769, is the rule in this case, nevertheless, the multiple conspiracies resulted in severe prejudice to the petitioner.

Continuing in the charge, the Court stated in part as follows:

> ". . . In other words, if you find that Soldano was a member of the conspiracy as charged along with Verzino, and he gave the heroin to Verzino, and that Verzino took it into the Southern District of

> New York with the intention of distributing it, you may find Soldano guilty of count 9."

On page A210 of the Appendix furnished to the Court below the Court in describing the conspiracy used the following language:

> ". . . Its ramifications, its tentacles are embedded deep in the very maw of the earth . . ."

In *Kotteakos*, at pages 769-70 of 388 U.S., this Court in determining whether there was harmless error or not where multiple conspiracies were shown, stated in part that:

> ". . . The Court here was careful to caution the jury to consider each defendant's case separately, in determining his participation in the 'scheme' charged. But this obviously does not, and could not go to keeping distinct conspiracies distinct in view of the Court's conception of the case . . ."
>
> ". . . Carrying forward this premise that the jury could find one conspiracy on the evidence, the trial judge further charged that if the jury found the conspiracy 'then the acts or the statements of any of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence against all of the defendants whom you so find to be members of the conspiracy . . .' ".

Then on page 771 of that opinion this Court stated in part as follows:

> "On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven

or another, and to find an overt act affecting all in conduct which admittedly could only have affected some . . ."

Furthermore, the Court by referring to "tentacles" acknowledged the spoke symbolization of the type of conspiracy here.

This Court is respectfully referred to Volume 17, Brooklyn Law Review, Fall 1975, page 243, et seq., "Notes: Resolution of the Multiple Conspiracy Issues Via a 'Nature of the Enterprise' Analysis: The ressurection of Agreement".

CONCLUSION:

For the aforementioned reasons, it is prayed that a writ of certiorari should issue.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 923, 982, 984, 1000—September Term, 1975
Argued: May 5, 1976 Decided: September 7, 1976
Docket Nos. 76-1011, 76-1058, 76-1062, 76-1064

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MAGNANO, a/k/a "Joe the Grind",
FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose",
RICHARD BOLLELLA,
ANTHONY DE LUTRO, a/k/a "Tony West",
ANTHONY SOLDANO, and FRANK LUCAS,

Defendants-Appellants.

Before:

HAYES AND MULLIGAN,

Circuit Judges,

and PALMIERI,

*District Judge**

Appeal from judgments of the United States District Court for the Southern District of New York convicting appellants, after jury trial before Irving Ben Cooper, *Judge,* of conspiring to traffic in narcotics and possession of narcotics with intent to distribute the same, in violation of 21 U.S.C. §§846, 841(a)(1), and 841(1)(A).

Affirmed.

GRETCHEN WHITE OBERMAN, New York, N.Y., *for Defendants-Appellants Magnano and Pallatta.*
GILBERT EPSTEIN, New York, N.Y. (Stokamer & Epstein, New York, N.Y., on the brief), *for Defendants-Appellant Bollella.*
H. RICHARD UVILLER, New York, N.Y., *for Defendant-Appellant De Lutro.*
ROBERT BLOSSNER, New York, N.Y., *for Defendant-Appellant Soldano.*
JEFFREY C. HOFFMAN, New York, N.Y., (Steven Duke and John L. Pollok, of counsel), *for Defendant—Appellant Lucas.*
DOMINIC F. AMOROSA, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, New York, N.Y., Nathaniel H. Akerman, Federico E. Virella, Jr., Howard S. Sussman, Lawrence B. Pedowitz, and John C. Sabetta, Assistant United States Attorneys of counsel), *for Appellee.*

HAYS, *Circuit Judge:*

Defendants-Appellants, asserting a host of alleged errors below, appeal from judgments of conviction for conspiring to traffic in narcotics and substantive violations of the narcotics laws. Only six of appellants' many arguments warrant discussion in this opinion. We have carefully considered each of the numerous claimed infirmities in their convictions and find none to be meritorious.

The facts adduced at trial evidenced a narcotics conspiracy network not dissimilar, except perhaps in the quantities involved, from many such conspiracies this Court has been called upon to review. The conspiracy, in

broad outline, assumed the customary structure of suppliers, distributors, and retailers. Some members of the conspiracy, depending on their functional level, dealt only with a few other members above or below them while other members transacted business up and down the chain. The evidence at trial, as found by the jury, proved that appellants Pallatta, Magnano, Bollella, De Lutro and Soldano individually and/or collectively sold heroin to the partnership of Ernest Malizia, Mario Perna and Anthony Verzino ("the distributors" or "the core group"). Malizia is a fugitive; Perna and Verzino were unindicted co-conspirators who testified for the Government. Appellant Lucas, a retailer, was the distributor's largest customer and, controlling his own large street level distribution network, purchased in excess of 100 pounds of heroin during the conspiracy.

I. *Single Conspiracy*

As is usual in narcotics conspiracy cases the allegation is here made that although the defendants were indicted and convicted as members of a single conspiracy the proof at trial showed multiple conspiracies. *Kotteakos v. United States*, 328 U.S. 750 (1946). Thus, while Magnano, Bollella and Pallatta jointly supplied the distributors, it is claimed that they formed no part of a conspiracy involving the other two suppliers, De Lutro and Soldano, each of whom also sold narcotics to the distributors. The appellentS claim the existence of at least three distinct conspiracies with each conspiracy defined by the supplier. In support of this claim appellants rely on the distinguishing facts that the distributors bought from De Lutro and from Soldano only once. In contrast, the transactions with the Magnano-Bollella-Pallatta partnership were numerous, generally credit exchanges and for diluted heroin.

We find the multiple conspiracy argument pressed by appellants with their particular emphasis on the single act

doctrine singularly unpersuasive. Precedent within this Circuit abounds for the proposition that one who deals in large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation. *United States v. Ortega-Alvarex*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denies*, 420 U.S. 995 (1975); *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974) *United States v. Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973), *vacated and remanded on other grounds*, 419 U.S. 903 (1974). The nature of the enterprise determines whether this presumption or inference of knowledge of broader scope and participation in a single conspiracy is justified. *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The suppliers in the instant conspiracy, each of whom dealt directly with a member or members of the distribution core group of Perna, Malizia and Verzino, provided that group with approximately 140 pounds of heroin. By virtue of this quantity the vertical nature of the conspiracy was known to the suppliers and customers. As expressed in *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939):

> "[T]he smugglers knew that middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers."

The quantities involved, moreover, permit the inference that the suppliers must have known there was a horizontal

scope to the conspiracy such that others were similarly performing in the supply role. *See United States v. Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975), *cert denied*, _____ U.S. _____ (1976); *United States v. Bynum*, *supra*, 485 F.2d at 495-497. This *inference* of knowledge, furthermore, is buttressed by evidence that the Magnano-Bollella-Pallatta partnership had *actual* knowledge that the distributors were purchasing from another source with monies owed to the partnership from credit sales to the core group.[1]

For much the same reasons the fact that De Lutro and Soldano each only consummated one transaction with the core group does not render their participation insufficient to warrant their inclusion in the single conspiracy charged. The so-called single transaction rule, *see, e.g., United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971) (*per curiam*); *United States v. Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), recognizes that a single isolated act does not, *per se*, support an inference that a defendant had knowledge of, or acquiesced in, a larger conspiratorial scheme. It is only "when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred," *United States v. Agueci*, *supra*, 310 F.2d at 836, that the single act is an insufficient predicate upon which to link the actor to the overall conspiracy. *See, United States*

1. Appellants' reliance on *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced. In *Bertolotti* the indictment charging a single conspiracy was held to be an improper consolidation of at least four separate and unrelated criminal ventures involving an assortment of "unorthodox and diverse transactions," *id.* at 155, such as to preclude an inference of knowledge. The instant case, in contrast, involves only narcotics transactions and is characterized by the usual structural framework employed by participants in a narcotics distribution scheme.

v. Sperling, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Reina*, 242 F. 2d 302, 306 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957). Each of the "single acts" here—DeLutro's sale of five kilos pure heroin and Soldano's sale of three kilos—was to core members of the conspiracy and of such a magnitude as to justify "an inference that each knew he was involved in a criminal enterprise of substantial scope." *United States v. DeNoia, supra*, 451 F.2d at 981. *See, United States v. La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1111-12 (2d Cir.), *cert. denied*, _____ U.S. _____ (1975); *United States v. Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974).[2]

II. *Prior Similar Crimes Evidence*

Government witness Verzino was permitted to testify to narcotics dealings he had with appellants Pallatta, Magnano, DeLutro, Bollella and Lucas several years before the conspiracy charged in the indictment commenced.

---

2. While we reject appellant's protestations of multiple conspiracies, even if we were to find the error of variance to have been committed, we would nevertheless find reversible error absent. As we have often noted, "the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance." *United States v. Agueci, supra*, 310 F.2d at 827. *See United States v. Sir Kue Chin*, _____ F.2d _____, _____ (2d Cir. 1976) slip op. at 3366 and cases cited therein. Each of these appellants were actively engaged in the drug world in a large-scale capacity. None were minor participants joined in trial with top echelon personnel such that proof of the guilt of major violators contaminated the jury's consideration of his guilt individually. *See United States v. Miley, supra*, 513 F.2d at 1209. Nor were the jury's deliberations infected by highly inflammatory testimony about any one of the codefendants which might spill over to the prejudice of others. *Compare United States v. Bertolotti*, 529 F.2d 149, 157-58 (2d Cir. 1975). Essentially the argument of prejudice here is merely a bald assertion that each would have fared better had he been tried alone. As we said in United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971), an appellant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one . . ." *See United States v. Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

Appellants claim admission of this testimony was error. We disagree.

The prior similar crimes testimony was admitted to explain how Verzino, who had been incarcerated from 1966 through August, 1973, was able to become an accepted member of the conspiracy upon his release. Evidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value. *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 96 S.Ct. 2169 (1976). Here, as in *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir.), *cert. denied*, 96 S.Ct. 1724 (1976), the Government offered the prior crime evidence for the legitimate purpose of showing the background and development of the conspiracy, and the district judge, properly exercising his discretion, committed no error in allowing its admission.

III. *The Charge to the Jury*

Appellants have compiled an assortment of claimed errors in the trial court's instructions which they argue compel reversal. Reviewing the instructions as a whole, *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973), we find these claims devoid of merit. We here address only the errors claimed in the court's instructions on reasonable doubt.

The remaining objections raised on appeal are either too frivolous to warrant discussion or, because of the failure to object below, have been waived, Fed. R. Crim. P. 30; *United States v. Ingenito*, _____ F.2d _____, _____ (2d Cir. 1976), slip op. at 2689, and are not such as to be saved by the plain error exception. Fed. R. Crim. P. 52(b).[3]

---

3. We briefly note appellant's claim relating to the court's accomplice testimony instruction. The claim is made that the trial court's instructions on this issue were totally inadequate because they failed to include the cautionary language of *United States v. Padgent*, 432 F.2d 710, 704 (2d Cir. 1970), which

Appellants vigorously argue that the court's failure to instruct the jury, as requested, in the express language of *Holland v. United States*, 348 U.S. 121, 140 (1954) is reversible error. *Holland* defines reasonable doubt as a doubt that would cause a person to hesitate to act in matters of importance in his own life. The judge below instead instructed the jury[4] that reasonable doubt is "an

---

warns that "[a]n accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony." As we said in *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), however, the *Padgent* language was suggested not for jury instructions but in the context of permitting an expansive scope for cross examination. The district court fully and adequately flagged the pitfalls of accomplice testimony for the jury's attention; the appellants have no serious ground for complaint.

4. The court's definition of reasonable doubt was in full as follows:

> Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.
>
> A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.
>
> Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives."

This Court has repeatedly expressed the desirability of *Holland's* hesitate to act" language and suggested its use as preferable to alternative phraseologies. *See United States v. Acarino*, 408 F.2d 512, 517 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); *United States v. Hart*, 407 F.2d 1087, 1091 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969); *United States v. Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Nuccio*, 373 F.2d 168, 174-75, (2d Cir.), *cert. denied*, 387 U.S. 906 (1967). In each of these cases, however, we found as we find in the instant appeal, that this difference of nuance does not constitute reversible error. Reading the entire charge it is clearly apparent that the substance of reasonable doubt was fairly conveyed to the jury.

Objection is made to the court's instruction that a

On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives—then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.

One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however, guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

reasonable doubt is "a doubt founded in reason," and it is "a doubt that is substantial and not shadowy." Such characterization is not erroneous. *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967) and in the context of the entire charge was not misleading. Similarly, appellants objections to that part of the instruction advising the jury that reasonable doubt "is not an excuse to avoid the performance of an unpleasant duty" and that if "the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted," are without merit. *See United States v. Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). While this portion of the charge in isolation may be unduly favorable to the government, *see United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975), *cert. denied*, _____ U.S. _____ (1976), it is not prejudicially erroneous when the charge is considered as a whole and especially when, as here, no objection was made below.

IV. *Admission of Cash into Evidence*

The government introduced into evidence slightly more than one-half million dollars in cash seized, pursuant to search warrant, from appellant Lucas' home on the day of his arrest. Appellants claim this to be prejudicial error arguing that the seizure took place nearly one year after the conspiracy terminated and that there was no connection between the cash and the crime charged. We reject this contention.

At the time the cash was seized drug paraphernalia was also found. These items, both the cash and instruments, were admissible evidence relevant to Lucas' participation in the conspiracy. Moreover, Government witnesses testified that Lucas owed the core group several hundred thousand dollars at the time of his arrest. As we said in *United States v. Tramunti, supra*, 513 F.2d at 1105, "[t]he possession of

large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." That the evidence is obtained by search conducted after the termination of a conspiracy does not preclude admissibility. *United States v. Bermudez, supra,* 526 F.2d at 95. Moreover, we do not find that the introduction of the physical evidence of the cash was so inflammatory or prejudicial to outweigh its probative value as appellants contend.

V. Soldano Identification

Appellant Soldano contends that the court erred in failing to hold a pre-trial evidentiary hearing to determine whether a photographic display in which Verzino identified Soldano was impermissibly suggestive. We need not explore the merits of this contention since, even assuming for purposes of decision that a hearing was warranted, no prejudice is cited by the appellant which would support reversal of his conviction.

The pre-trial photographic identification of Soldano by Verzino was not introduced by the Government at trial. Rather, Verzino made an in-court identification of Soldano after testifying to several face to face meetings he and Soldano had prior to consummating a narcotics transaction. This testimony firmly established an independent basis for the in-court identification. On cross-examination Soldano's counsel had full opportunity to explore the circumstances of the pre-trial identification at which Soldano's picture was one of 32 pictures shown to Verzino. Even on appeal counsel does not seriously argue that the display was impermissibly suggestive or advance any real claim of prejudice suffered therefrom. In *Simmons v. United States,* 390 U.S. 377, 384 (1968), the Supreme Court held "that convictions based on eyewitness identification at trial following a pretrial identification by

photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Appellant's claim clearly does not meet that standard and must fail.

VI. *Brady Disclosure Subsequent to Trial*

Two weeks after trial ended the Government furnished appellants' counsel and the court with three written statements of Mario Perna, a chief Government witness at trial. Appellants immediately moved for a new trial based on newly discovered evidence pursuant to Fed. R. Crim. P. 33. This motion was denied without an evidentiary hearing. In its order the court below found the Government's failure to disclose these statements earlier was inadvertent; that the statements would not have produced a different verdict if available at trial; that the statements were at best cumulative on the issue of credibility and without bearing on the issue of defendants' guilt; and that Perna's testimony was corroborated at trial by other evidence.

We find these findings of the district court fully supported in the record. As such, the court's denial of the motion on the basis of affidavits and without an evidentiary hearing was not error. *See, United States v. Persico,* 339 F. Supp. 1077 (E.D.N.Y.), *aff'd,* 467 F.2d 485 (2d Cir. 1972), *cert. denied,* 410 U.S. 946 (1973). *Cf., United States v. Franzese,* 525 F.2d 27 (2d Cir. 1975).

Affirmed.